

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
BRUCE DUANE BENDER and)	CASE NO. 01-30727 HCD
AMANDA DESIREE BENDER,)	CHAPTER 7
)	
DEBTORS.)	

Appearances:

Christopher Potts, Esq., Attorney for debtors, 108 North Main Street, Suite 611, South Bend, Indiana 46601; and

Paul D. Eash, Esq., Attorney for creditor, Executive Building, Suite 3B, 500 North Nappanee Street, Elkhart, Indiana 46514.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 14, 2003.

The court's Order of September 6, 2002, granted the Motion to Avoid Lien of Radabaugh Truck Service, Inc., filed by the debtors Bruce Duane Bender and Amanda Desiree Bender ("debtors"). Presently before the court is the Motion to Set Aside Ruling Avoiding Lien of Radabaugh Truck Service, Inc., filed by the creditor Radabaugh Truck Service, Inc. ("Radabaugh" or "creditor"). After a hearing on the creditor's motion, the court took the matter under advisement on November 1, 2002.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(B) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 9014. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtors filed their voluntary petition under chapter 7 of the Bankruptcy Code on February 23, 2001. In their schedules, they listed Radabaugh as a creditor holding a prepetition state court judgment against them in the amount of \$5,775.99.

On June 7, 2002, the debtors filed a Motion to Avoid Lien of Radabaugh Truck Service, Inc. *See* R. 39. They stated in the motion that Radabaugh's judgment constituted a judicial lien against the debtors' interest in their residence which would otherwise be exempt under Indiana law. The debtors asked the court to avoid that judicial lien under 11 U.S.C. § 522(f)(1) to the extent that the debtors' exemptions were thereby impaired. On June 28, 2002, Radabaugh filed its Objection to the motion. *See* R. 46. It asserted that its judgment lien should not be avoided pursuant to 11 U.S.C. § 522(b) and Indiana Code 34-55-10-2(b)(1), which allowed a maximum real estate exemption of \$7,500.

The court set a hearing on the motion for August 29, 2002, and notice of the hearing was issued on July 24, 2002. *See* R. 47. On the appointed date, Christopher Potts, Esq., attorney for the debtors, appeared in court. However, the creditor's attorney, Paul D. Eash, Esq., did not attend the hearing. The court heard the factual background concerning the judicial lien and the debtors' reasons for requesting its avoidance. It then ordered that the lien upon the real estate was avoided. In its Order of September 6, 2002, the court granted the debtors' Motion to Avoid Lien.

Twenty days later, on September 26, 2002, the creditor filed its Motion to Set Aside Ruling Avoiding Lien of Radabaugh Truck Service, Inc. The court held a hearing on that motion on October 29, 2002. In the motion and at the hearing, counsel for the creditor stated that he was not present at the hearing due to an

“electronic error that occurred on Paul Eash’s Palm Pilot calendar that caused the August 29, 2002 hearing date to be erased from his calendar.” R. 56 at 1. He stated that his absence was due to excusable neglect, and asked that the court’s Order be set aside pursuant to Federal Rule of Civil Procedure 60(b)(1). The debtors responded that the creditor must demonstrate a reasonable probability of success on the merits as well as excusable neglect. They explained that they have equity in the real estate and that the judicial lien is less than the amount of the exemption to which they are entitled. For that reason, the debtors asserted, the creditor had no probability of success on the merits.

The creditor replied that it could succeed on the merits by relying on *Columbus Auto Auction, Inc. v. Zupan (In re Zupan)*, 172 B.R. 250 (Bankr. S.D. Ind. 1993), which was directly on point. It asserted that *Zupan* made clear that, in Indiana, a judicial lien does not attach to the debtors’ homestead interest in the property or to the exemption; it attaches only to the debtor’s property that exceeds the amount allowed under the homestead exemption. The creditor then argued that, because the lien attached to the real estate, the court could not avoid the lien because of the homestead exemption, to which the lien could not attach. It added that, if the lien remained and the value of the equity should increase in the future, it was possible that the equity would exceed the amount of the exemption. Radabaugh therefore requested that the lien not be avoided.

The debtors responded to the creditor’s argument on the merits by pointing out that § 522 allows a debtor to avoid liens that attach to the exempt portion of the equity in the real estate. In this case, the amount of the judgment lien, about \$5,400, does not exceed the amount of the exemption being claimed by the debtors.

After hearing the arguments of the parties, the court made the following findings: (1) The market value of the real estate, the residence on York Street, is \$92,000; (2) the amount of the secured claim against it, the bank’s mortgage, is \$84,000; and (3) on Schedule C, the debtors claimed an exemption of \$8,000. The court then made these conclusions of law: (1) In a joint case, the debtors are entitled to a real estate exemption of

\$15,000; (2) the amount of equity in the marital residence does not exceed the amount of the exemption; and (3) Radabaugh, which is listed on Schedule F as an unsecured creditor, holds an avoidable judgment lien.

The court found that the motion to set aside the earlier ruling had little probability of success on the merits, but took the matter under advisement to consider whether *Zupan* might cause the court to reconsider its assessment of the merits.

Discussion

The creditor has filed a motion to set aside the court's ruling of September 6, 2002. This court deems the motion a Rule 60(b) motion because it was filed more than ten days after the judgment. *See Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000). Under Federal Rule of Civil Procedure 60(b)(1), made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024, "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b)(1). The creditor's attorney claims excusable neglect on the ground that his Palm Pilot erased the court hearing date.

Case law (found usually in unpublished decisions) reflects that courts considering "excusable neglect" under Rule 60(b) were more apt to excuse an attorney's computer-related mistakes when the lawyer missed filing deadlines than when he missed a scheduled court appearance. Nevertheless, at the invitation of debtors' counsel to weigh the creditor's probability of success on the merits, this court delayed ruling on the Rule 60(b) motion in order and considered whether the creditor had a meritorious response to the substantive issue before the court, the avoidance of the creditor's lien.

The issue is whether the creditor's judgment lien on the debtors' residential real estate, in which they claim an exemption,¹ can be avoided by the debtors pursuant to 11 U.S.C. § 522(f).

Section 522(f) provides that "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is (A) a judicial lien. . . ." The creditor does not dispute that the debtors' residential real estate is entitled to an exemption pursuant to Indiana statute, which provides:

(b) The following property of a judgment debtor domiciled in Indiana is not subject to levy or sale on execution or any other final process from a court, for a judgment founded upon an express or implied contract or a tort claim:

(1) Real estate or personal property constituting the personal or family residence of the judgment debtor or a dependent of the judgment debtor, or estates or rights in that real estate or personal property, of not more than seven thousand five hundred dollars (\$7,500). The exemption under this subsection is individually available to joint judgment debtors concerning property held by them as tenants by the entireties.

Ind. Code § 34-55-10-2(b)(1). Under Indiana law, therefore, each of the debtors has a right to an exemption of \$7,500 for the family residence; the Benders together have a \$15,000 exemption in the real estate. Since they are entitled to that exemption, the court next considers whether the exemption is impaired or encumbered by the judicial lien of Radabaugh.

¹ The Bankruptcy Code allows a debtor to exempt from his or her bankruptcy estate certain types and amounts of property. See 11 U.S.C. § 522. Individual states may choose to opt out of the federal provisions, substituting their own set of exemptions for the federal exemption scheme, and Indiana is among those states opting out. See § 522(b); *Citizens Nat'l Bank v. Foster*, 668 N.E.2d 1236, 1238 (Ind. 1996). The present exemption statute is Indiana Code 34-55-10-2. It has superseded the repealed Indiana Code 34-2-28-0.5. These debtors may exempt from their estate only the property specified as exempt by Indiana law. See *In re Jones*, 768 F.2d 923, 927 (7th Cir. 1985); *In re Berryhill*, 254 B.R. 242, 243 (Bankr. N.D. Ind. 2000). Their right to the exemption is determined as of the date of the bankruptcy petition. See *In re Burns*, 218 B.R. 897, 898 (Bankr. N.D. Ind. 1998).

Radabaugh is a creditor holding a judicial lien by virtue of a judgment entered in the Elkhart Superior Court.² See *Radabaugh Truck Serv. v. Bender*, 20D01-0009-CP-592. Although liens usually “pass through bankruptcy unaffected,” *In re Zupan*, 172 B.R. at 251 (citing *Farrey v. Sanderfoot*, 500 U.S. 291, 296-98 (1991)), judicial liens may be avoided by a debtor to the extent that they impair the debtor’s exemption. See § 522(f)(1); *Owen v. Owen*, 500 U.S. 305, 306, 111 S. Ct. 1833, 1834, 114 L.Ed.2d 350 (1991) (stating that the Bankruptcy Code “provides that judicial liens encumbering exempt property can be eliminated”). Section 522(f) is intended to protect a debtor’s exemption so that the debtor may receive the fresh start promised by the Bankruptcy Code. See *In re Berryhill*, 254 B.R. 242, 244 (Bankr. N.D. Ind. 2000).

As the creditor correctly noted, *In re Zupan* properly described the Indiana exemptions law: “It is well-settled in Indiana that a judgment lien does not attach to the debtor’s homestead interest in property. The judgment lien attaches only to the debtor’s property that exceeds the amount allowed by statute as a homestead.” *In re Zupan*, 172 B.R. at 252 (citations omitted). However, Radabaugh then argued that, according to *Zupan*, its lien should not be avoided on the debtors’ real estate because of the homestead exemption, to which the lien could not attach. This argued consequence of *Zupan* is a misinterpretation of that case. The case makes clear that a lien may be avoided “to protect ‘an exemption to which the debtor would have been entitled.’” *Id.* (quoting § 522(f)). In this case, the debtors have a right, created by state law, to an exemption of \$15,000. If, for example, a debtors’ residence has a market value of \$100,000, is subject to a mortgage balance of \$85,000, and is entitled to a homestead exemption of \$15,000, then a judicial lien (in any amount) on the property may be avoided to protect the homestead exemption to which the debtors are entitled. See, e.g., *East Cambridge Sav. Bank v. Silveira (In re Silveira)*, 141 F.3d 34, 36-37 (1st Cir. 1998) (using hypothetical examples to demonstrate when

² The creditor has not stated that its judgment was duly entered and indexed in the county in which the property was located. See *Columbus Auto Auction, Inc. v. Zupan (In re Zupan)*, 172 B.R. 250, 252 (Bankr. S.D. Ind. 1993). However, the debtors have not challenged the lien’s attachment to their real estate.

a judicial lien impairs an exemption). Moreover, the debtors' right to the exemption and their valuation of the property for which an exemption is claimed are both determined at the time of the bankruptcy filing. *See In re Vokac*, 273 B.R. 553, 557 (Bankr. N.D. Ill. 2002); *In re Burns*, 218 B.R. 897, 898 (Bankr. N.D. Ind. 1998).

The exemption statute sets forth the formula for measuring the impairment of an exemption. It states that "a lien shall be considered to impair an exemption to the extent that the sum of — (i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; — exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

In this case, the debtors' property is encumbered by an \$84,000.00 mortgage in favor of The Provident Bank National Servicing Center, Cincinnati, Ohio, and a \$5,775.99 judicial lien in favor of Radabaugh. The debtors list the present value of the real estate as \$92,000.00 and the value of the exemption claimed as \$8,000.00. Following the formula, the court finds that the sum of the liens (\$89,775.99) and of the \$15,000.00 exemption the debtors are entitled to claim is \$104,775.99. This amount exceeds the fair market value of the property, \$92,000.00. Therefore, the state law exemption of \$7,500.00 per debtor is impaired. *See In re Bradshaw*, 156 B.R. 239, 241 (Bankr. S.D. Ind. 1993). The mortgage lien, a first priority secured lien, is not avoidable. However, the judicial lien of the creditor Radabaugh impairs the debtors' exemption. For that reason, the court determines that the debtors may avoid the creditor's judicial lien pursuant to § 522(f).

The court concludes that its ruling in the Order of September 6, 2002, was correct and must not be set aside. It further finds that the creditor's reason for seeking relief from that Order — its attorney's claim that his Palm Pilot erased the court hearing date — does not qualify as "excusable neglect."

Conclusion

Upon careful consideration of all the relevant circumstances surrounding the attorney's absence from the court's scheduled hearing on the Debtors' Motion to Avoid Lien, the court finds that counsel's missed attendance (due to his Palm Pilot's malfunction) was neglect that is not excusable for the purposes of Federal Rule of Civil Procedure 60(b)(1), made applicable in bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 9024. The court also determines that the creditor did not demonstrate any justification for the court to reconsider its earlier ruling. The court therefore denies the creditor's Motion to Set Aside Ruling Avoiding Lien of Radabaugh Truck Service, Inc. It reaffirms its Order of September 6, 2002, which declared that Radabaugh's judicial lien is avoided pursuant to 11 U.S.C. § 522(f).

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT